Petition

Supreme Court, U.S.
FILED
MAR 24 1982
ALEXANDER L. STEVAS
CLERK

81-1768

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

DOUGLAS BOSS, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

QUESTIONS PRESENTED FOR REVIEW

1. Is it a denial of substantive due process to not allow a defendant a hearing on the question of vindictive and selective prosecution of said defendant, when there is timely filed in the District Court a Motion to Dismiss and Request for Evidentiary Hearing, based upon the question of whether the indictment and prosecution of said defendant is vindictive and selective and the District Court refuses to give said defendant a hearing on same.

2. Is the indictment of a defendant vindictive and selective when it is solely the result of said defendant exercising his Fifth Amendment right not to incriminate himself by giving ex parte statements to government agents.

PARTIES TO THIS PROCEEDING

The parties to this proceeding are the petitioner, Douglas Boss, and the respondent, United States of America. J. C. Boss, Jr., a/k/a J. C. Boss, petitioner's father, was a co-defendant at the District Court level, however, the indictment against J. C. Boss, Jr., was dismissed at trial.

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OPINIONS OF THE LOWER COURTS

The opinions which have been delivered in this cause consist of the following:

A. Opinion by the Honorable Frank H. Seay, United States District Judge, United States District Court, Eastern District of Oklahoma, entered May 15, 1980, and not reported, denying petitioner's Motion to Dismiss and denying petitioner's Request for Evidentiary Hearing. See Appendix, Page 29a.

B. Judgment by the Honorable Frank H. Seay, United States District Judge, United States District

Court, Eastern District of Oklahoma, entered June 25, 1980, which is the Judgment and Sentence finding petitioner guilty. See Appendix, Page 32a.

C. Per Curiam Opinion in this cause of the United States Court of Appeals, Tenth Circuit, entered March 24, 1981, which was not for routine publication. See Appendix, Page 36a. This Opinion incorporated within same Opinion of the United States Court of Appeals, Circuit Judge Logan, entered the same date for publication, Opinion in Cause No. 80-1472, entitled United States of America v. J. C. Boss, Jr., J. C. Boss, Jr. being the father of petitioner herein. See Appendix, Page 39a.

D. Order Denying Rehearing, in this cause, of the United States Court of Appeals, Tenth Circuit, entered February 18, 1982. See Appendix, Page 43a.

E. Order Denying Rehearing in Banc, in this cause, of the United States Court of Appeals, Tenth Circuit, entered February 23, 1982. See Appendix, Page 45a.

GROUNDS UPON WHICH JURISDICTION IS INVOKED

The dates of the judgments sought to be reviewed are May 15, 1980, the date of the Order entered at the District Court level; June 25, 1980, the Judgment entered at the District Court level; March 24, 1981, the date of the Opinion of the Tenth Circuit; February 18, 1982, the date the Tenth Circuit denied rehearing; and February 23, 1982, the date the Tenth Circuit denied rehearing in banc.

The statutory provision which confers jurisdiction upon this Court is 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved in this action is Amendment V to the Constitution of the United States, which states as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The specific provisions of said amendment involved relate to (1) due process and (2) self incrimination.

STATEMENT OF CASE

Prior to August 25, 1977, one James C. Buchanan had become Sheriff of Choctaw County, Oklahoma. As often happens in rural, as well as urban areas, he was crooked when elected or became crooked.

On August 25, 1977, a truckload of whiskey en route from Kentucky to California mysteriously appeared within the Sheriff's domain. The truck was found on a country road, the whiskey in a barn. The barn was near a rural club at which petitioner, Douglas Boss, was employed.

On June 19, 1978, petitioner was indicted in the U.S. District Court for the Eastern District of Oklahoma on two counts, stealing the liquor on August 25,

1977, and its possession on September 3, 1977. Petitioner was tried in August of 1978. He testified for himself, as did his father, J. C. Boss, Jr., and petitioner was acquitted. Honorable Julian K. Fite was the U.S. Attorney.

Among the witnesses testifying against petitioner were Sheriff Buchanan, Ricky Kee, and eight others. Kee admitted having given false testimony. Buchanan was eventually, but much later, charged with obstructing investigation of the theft and was convicted.

Neither petitioner nor his father heard anything more about the missing whiskey for almost two years. On February 24, 1980, U.S. Attorney Julian Fite telephoned one of the lawyers who had represented petitioner in the 1978 case, threatening that unless petitioner and his father would testify against Sheriff Buchanan, petitioner and his father would be prosecuted for perjury arising out of the August, 1978, trial of petitioner, and that petitioner's father would be prosecuted for the liquor theft of 1977.

The attorney who was called relayed the threat to petitioner and advised him of his right against self incrimination. Counsel helped arrange a meeting between govenment agents and petitioner, at which time the threats of prosecution were repeated.

On February 5, 1980, J. C. Boss, Jr., was indicted for the liquor theft.

On February 22, 1980, U. S. Attorney Julian Fite again called petitioner and petitioner's father's lawyer, saying that if they would testify against the Sheriff, Fite would (1) not oppose a Motion to Reduce Sentence on another charge upon which petitioner had

been convicted, upon U.S. Attorney Fite's prosecution (This charge was eventually dismissed by the Tenth Circuit Court of Appeals); (2) permit petitioner's father to plead to a misdemeanor on the liquor theft; (3) try to get the State District Attorney to dismiss a pending action against petitioner (Petitioner stood trial on the state court action and was acquitted); (4) not indict petitioner and petitioner's father for perjury.

Petitioner's attorney advised petitioner and his father to tell what, if anything, they knew about the Sheriff, but to tell it to a Grand Jury under a grant of immunity, after making a claim of privilege against self incrimination. This privilege to talk to a Grand Jury was never granted. Instead, on April 23, 1980, petitioner and his father were indicted for perjury.

They promptly, and on April 28, 1980, filed a six-page Motion to Dismiss and Motion for Evidentiary Hearing upon the grounds that their prosecution was vindictive and selective and to punish them for refusing to waive their Fifth Amendment privilege, against self incrimination, without grant of immunity. This Motion was in detail and was supported by a Brief. See Appendix, Page 1a, for said Motion and Appendix, Page 11a, for the Brief in support of same.

The trial court overruled the Motions and refused to grant petitioner a hearing on same by its written Order of May 15, 1980. See Appendix, Page 29a.

WHY THE WRIT SHOULD BE ALLOWED

When petitioner filed in the District Court his Motion to Dismiss and Request for Evidentiary Hearing on the question of whether his prosecution was vindictive and selective, the District Court should

have at least allowed petitioner hearing and permitted the introduction of evidence on the question of vindictive and selective prosecution.

The District Court's denial of a hearing on petitioner's Motion and Request for Evidentiary Hearing and the Tenth Circuit's approval of same; (1) is in conflict with the decision of another Federal Court of Appeals on the same matter; (2) departs from the accepted and usual course of judicial proceedings; and (3) is in conflict with prior decisions of this Court, which hold that it is a violation of due process when vindictiveness is exercsed against a defendant for exercising a constitutional right.

The United States Court of Appeals, Ninth Circuit, has held that when a claim of selective and vindictive prosecution is made, the District Court is required to allow the defendant to present evidence regarding same. This was the holding in U.S.A. v. OAKS, 508 F.2d 1403 (1974 CA Ninth), wherein the Ninth Circuit stated in part as follows:

> "Oaks contends that he was selected for prosecution solely because he protested publicly against federal tax policies. While we express no opinion upon this issue, *the law in this circuit requires the district court, upon a proper offer of proof, to allow Oaks to present evidence,* if any, that he has been singled out for discriminatory prosecution. (Emphasis added.)
>
> * * *
>
> "Oaks argues that under this circuit's STEELE rationale he has alleged facts sufficient to require a hearing on his claim of discriminatory selective prosecution. Hearings on similar pre-trial objections are usually in order when enough facts are alleged to take the question past the frivolous

> stage. See, e.g., LAWN v. UNITED STATES, 355 U.S. 339, 346-350, 78 S.Ct. 311, 2 L.Ed.2d 321 (1958); NARDONE v. UNITED STATES, 308 U.S. 338, 342, 60 S.Ct. 266, 84 L.Ed. 307 (1939); UNITED STATES v. FUJIMOTO, 102 F.Supp. 890, 893 (D. Hawaii 1952). We hold that Oaks has alleged enough facts to require an evidentiary hearing.
>
> * * *
>
> "This cause is remanded for a hearing on the issue of discriminatory prosecution. If the District Court finds that there was impermissible discrimination, it should dismiss the indictment.* * * "

In this case, petitioner made a proper offer of proof, alleging that his prosecution in this case was the sole result of petitioner's exercise of his Fifth Amendment right, not to give incriminating evidence against himself, such Motion having attached to it documentation regarding same. See Appendix, Page 1a. Said Motion was supported by Brief. See Appendix, Page 11a. The District Court's action of denying petitioner a hearing on the question of vindictive and selective prosecution, was approved by the Tenth Circuit and is in direct conflict with the Ninth Circuit's ruling above.

The petitioner's exercise of his Fifth Amendment right, not to incriminate himself, is a constitutionally-protected right. Due process of law requires that there be no vindictiveness against petitioner for exercise of such right. This Court has held that it is a violation of due process of law for vindictiveness to be exercised against a defendant for exercising his right of appeal. This was stated by Mr. Justice Stewart in NORTH CAROLINA v. PEARCE, 89 S.Ct. 2072, 395 U.S. 711 (1969), wherein Justice Stewart stated in part as follows:

> "(10) Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of a right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing Judge."

This Court has also held that under due process clause, that a defendant is to be freed of any apprehension of a retaliatory motivation, for the exercise of a right given by law. In the case of BLACKLEDGE v. PERRY, 94 S.Ct. 2098, 417 U.S. 21 (1974), Mr. Justice Stewart stated in part as follows:

> "* * * The rationale of our judgment in the *Pearce* case, however, was not grounded upon the proposition that actual retaliatory motivation must inevitably exist. Rather, we emphasized that 'since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.' 395 U.S., at 725, 89 S.Ct. at 2080. We think it clear that the same considerations apply here. A person convicted of an offense is entitled to pursue his statutory right to a trial *de novo,* without apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration. Cf. United States v. Jackson, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138.

> "(5) Due process of law requires that such a potential for vindictiveness must not enter into North Carolina's two-tiered appellate process. We hold, therefore, that it was not constitutionally permissible for the State to respond to Perry's invocation of his statutory right to appeal by bringing a more serious charge against him prior to the trial *de novo*." (Emphasis theirs.)

This is not a case where there were plea negotiations going on with the petitioner at the time of his indictment for perjury. The Honorable Julian K. Fite, U.S. Attorney, was the prosecuting attorney, who tried the 1978 whiskey case upon which petitioner was acquitted, and which was the basis of petitioner's perjury charge nearly two years later by the same U.S. Attorney. The petitioner exercised his Fifth Amendment right against self incrimination when contacted nearly two years after the whiskey trial, and upon exercising that right, this made the U.S. Attorney mad and, therefore, petitioner was indicted in this cause, for perjury. It is a denial of due process, under the United States Constitution, for petitioner to be prosecuted solely upon the basis of petitioner's exercise of his Fifth Amendment right against self incrimination. At the very least, the District Court should have allowed petitioner a hearing upon such question.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

Appendix

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

No. 80-30-CR

UNITED STATES OF AMERICA, *Plaintiff*,

vs.

DOUGLAS BOSS, and J. C. BOSS, *Defendants*.

MOTION TO DISMISS AND MOTION FOR EVIDENTIARY HEARING

(Filed April 28, 1980)

Come now the defendants, Douglas Boss and J. C. Boss, and move the Court to dismiss this action for the reason that this prosecution is selective and vindictive and is brought in bad faith for the reason that these defendants refused to give certain information to the Government which the Government claimed these defendants had access to and which the defendants may or may not have, but are not required to reveal by the mere questioning by Government agents. This prosecution is brought as punishment for these defendants to punish them for refusing to waive their Fifth Amendment rights to not give self-incriminating testimony and is in addition to being vindictive, a selective prosecution, as will be further shown herein.

On June 19, 1978, the defendant Douglas Boss was indicted in this Court in Cause No. 78-67-CR on a two-count indictment claiming violation of 18 U.S.A. 659. In Count One the said Douglas Boss was charged with embezzling, stealing, taking or carrying away 904 cases of liquor in interstate shipment on August 25, 1977. In Count Two the said Douglas Boss was charged with having the same

liquor in his possession on September 3, 1977. Trial was had in said case in late August of 1978 before the Honorable H. Dale Cook, which trial resulted in the acquittal of the said Douglas Boss on both counts.

At that time the Government introduced witness or witnesses who testified that both the said Douglas Boss and J. C. Boss were present in a barn near Hugo, Oklahoma, on August 25th where such whiskey was. In support of this statement, reference is made to page 6 of Reporter's Partial Transcript of Testimony of Ricky O'Dell Key and a photocopy of said page 6 is attached hereto.

Thereafter, the Government commenced some investigation concerning other people in Southeastern Oklahoma for various crimes, including one James Buchanan. On February 4, 1980, between 2:35 and 5:00 p.m., Honorable Julian Fite, United States District Attorney, called the office of defendant's counsel and talked to Michael Burrage and told Michael Burrage that unless the two defendants herein gave testimony against James Buchanan, that the defendant J. C. Boss would be indicted for theft of whiskey in interstate transport and that both these defendants would be prosecuted for perjury. The said Michael Burrage immediately informed these defendants of such conversation and advised them of the possibility of self-incrimination as a result of any statement which these defendants or either of them might give the Government and that they had a constitutional right not to incriminate themselves. At that time these defendants' principal counsel, Joe Stamper, was out of the state.

At one stage a conversation took place between the U. S. District Attorney and/or his assistants and counsel for these defendants, and these defendants' counsel arranged an appointment between agents of the Federal Bureau of Investigation and these defendants out of the presence of defendants' counsel and it was stated or implied to these defendants that if they would waive their Fifth Amend-

ment rights and make statements against James Buchanan and/or other persons, that J. C. Boss would not be indicted for theft from interstate commerce and that these two defendatns would not be indicted for perjury. These defendants, availing themselves of their constitutional rights, declined to make self-incriminating statements to the said representatives of the FBI.

On February 22, 1980, the Honorable Julian Fite called the office of the defendants' counsel and talked to Joe Stamper and stated that if these defendants would give testimony against James Buchanan that he would not cause them to be indicted. The exact content of such conversation is shown by copy of letter dated February 25, 1980, from defendants' counsel to them attached hereto and made an exhibit hereof, which summarizes the conversation between the Honorable Julian Fite and defendants' counsel and this is presented to show the exact content of the conversation by reason of its being written promptly after such conversation occurred.

The defendant J. C. Boss was indicted on February 5, 1980, in Cause No. 80-9-CR and was tried in this Court on April 7, 8, and 9, 1980, and was convicted.

The action of the Government in waiting from August 25, 1977, when the offenses charged herein are alleged to have occurred and April 23, 1980, when indictment occurred, and with the Government having information in its possession at all times and after such long lapse of time, indicting these defendants by reason of their refusal to waive constitutional rights, constitutes vindictive and selective prosecution in viola n of the Fifth, Eighth and Fourteenth Amendments to the Constitution of the United States. As further evidence of the selectivity of this prosecution, these defendants state that one Ricky Kee admitted in the trial of the defendant J. C. Boss, commencing April 7, 1980, that he had given false and perjured testimony on behalf of the Government in the trial of Douglas Boss on

or about August 29, 1978, and has not been prosecuted, and the District Attorney indicated to defendants' counsel by telephone on April 24, 1980, that his prosecution was not intended.

With respect to the charges of theft from interstate commerce upon which the defendant Douglas Boss was acquitted and the defendant J. C. Boss was convicted, the following persons are believed to have given testimony or made statements giving grounds for indictment and possible conviction of such interstate theft or possession: Stanley Welton Mathis, Ricky O'Dell Kee, Harvey Don Davidson, Ricky Houston, James Buchanan, Roylia Akins, Earl K. Maxwell, E. D. Gaylor, Don Spanhanks, and Marion Carroll Young, and defendants suspect and desire information as to whether similar statements have not been received by the Government from Tot Davidson, Joe Colvin, Jimmy Coker, Walter Thomas Chapman, or Edwin Decker. Of this group, consisting of 15 in addition to these two defendants, allegedly involved in the theft of said liquor, the only ones who have been indicted or prosecuted in connection therewith are Mathis, Buchanan and these two defendants. The indictments of both Mathis and Buchanan were for multiple charges and all charges were dismissed except those relating to the alleged theft from interstate commerce.

There were contradictions at the trial of J. C. Boss and of Douglas Boss between witnesses' testimony which would give grounds for the prosecution for indictment for perjury for various of said witnesses and some of the witnesses testifying at the trial of J. C. Boss specifically admitted that they had perjured themselves at previous trials. Yet no one has been indicted for perjury.

As further evidence of selective and vindictive prosecution herein, these defendants, at evidentiary hearing which they pray for herein, desire to question the Clerk of this Court and the District Attorney and his staff as to how

many criminal trials have been conducted in this District since the appointment of the present District Attorney and how many defendants have testified in such cases and how many of such defendants who denied their guilt in their testimony have been convicted and how many of said defendants after their conviction and after they had denied the allegations in their indictments or informations, have been prosecuted for perjury. It is the belief of these defendants that many people have been prosecuted by the present District Attorney and his staff and have made statements in their trials in denial of the charges against them, have nevertheless been convicted by juries, and are just as subject to prosecution for perjury as are these defendants and have not been indicted or charged with perjury and to prosecute these two defendants out of the untold number which can only be adduced at an evidentiary hearing herein, should lend great weight to defendants' contentions that the present prosecution is vindictive and selective and in violation of defendants' constitutional rights.

At such evidentiary hearing, these defendatns will seek to introduce the testimony of the Honorable Julian Fite, United States District Attorney, and members of his staff, to prove the conversations related herein between counsel for these defendants and the United States District Attorney's Office; they will introduce the testimony of these defendants and of Jerry Thomason of the FBI as to conversations had between the said Thomason and attorneys for these defendatns as hereinbefore set forth, and the records of the office of the United States Court Clerk to show how many, if any, of the defendants who were tried or witnesses whose relation of evidence were in disagreement with the relations of the Government's witnesses, have been prosecuted, and will further seek to show from the records of this Court that Ricky O'Dell Kee, although he admitted that he committed perjury, has not been prosecuted therefor.

These defendants further pray for continuance of any further proceedings herein until such hearing has been held and sufficient time to prepare for such hearing to issue subpoenas for the attendance of witnesses and to prepare for such hearing.

These defendants and their counsel sincerely believe that under the law, they are entitled to such evidentiary hearing and sustaining by the Court of this Motion. The defendants are impoverished, are in debt to their counsel and other people, and if they are correct in their contentions herein with respect to this Motion, they should be allowed an interlocutory appeal to the Court of Appeals for the Tenth Circuit for the purpose of determining: (1) whether the evidentiary hearing should have been granted, if it is denied; (2), if, after evidentiary hearing this Motion not be sustained, whether it should have been sustained. There is sufficient question as to either of the two alternatives immediately hereinbefore set forth that these defendants are entitled to have this matter decided prior to the great expense to which they would be put in the event of an unnecessary trial and are entitled to have this matter decided prior to trial.

The defendants do, by appending their signature to this Motion, waive their right to a speedy trial under the Speedy Trial Act in order that they may be afforded time for the preparation of this hearing and interlocutory appeal if they be unsuccessful in the presentation of this motion.

Defendants further pray that the very inadequate five days ordinarily granted defendants for the preparation of Pre-Trial Motions be extended to 15 days and state that their chief counsel who prepares this Motion immediately after learning of the defendants' indictment, and on Thursday, April 24, 1980, along with their other counsel, must be in Houston, Texas, on April 25, 1980, and that their chief counsel will be in Texas until at least April 30, 1980,

and such fact is known to the District Attorney and has been for some weeks and was known to the District Attorney at the time this indictment was returned and arraignment set for April 28, 1980.

These defendants pray for an evidentiary hearing to determine the validity of these charges and submit Brief in support hereof.

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P. O. Box 100
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By /s/ JOE STAMPER
Attorneys for Defendants

/s/ DOUGLAS BOSS
Douglas Boss

/s/ J. C. BOSS
J. C. Boss
Defendants

WITNESSES TO SIGNATURES OF
DOUGLAS BOSS AND J. C. BOSS:

/s/ PAT LATHER

/s/ DONNA NASH

CERTIFICATE OF DELIVERY

I hereby certify that on this 28th day of April, 1980, I delivered a true and correct copy of the foregoing Motion, with Brief in support thereof attached thereto, to the (Assistant) United States District Attorney, in open court.

/s/ MICHAEL BURRAGE

TRANSCRIPT

[6] Q. All right. Now, did you unload the truck all by yourself?

A. No, sir.

Q. Who else helped?

A. Doug and——

Q. Is that Doug Boss, the defendant?

A. Yes, sir.

Q. All right.

A. And J. C. Boss.

Q. Is that Doug's dad?

A. Yes, sir.

Q. All right. After you unloaded the whiskey, what did you then do?

A. I took the truck out by Ratan and left it.

Q. All right. In what kind of condition did you leave the truck?

A. It was all right. It was still running.

Q. The motor was still running?

A. Yes, sir.

Q. All right. Then how did you get back to wherever you were going after you abandoned that truck near Ratan?

A. They brought us back.

Q. Who brought you back?

A. It was Doug and his daddy, I believe. It was in a pickup.

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February 25, 1980

Mr. J. C. Boss; and
Mr. Doug Boss
Park City East Trailer Park
Paris, Texas 75460

Dear Doug and J. C.:

Julian Fite called me Friday afternoon. I told him I had talked to you all and that I didn't think you wanted to make any deal with the Government, but I would listen to whatever proposition he made. He made four points if you would cooperate with the Government: They are as follows:

(1. He can't do anything about the three years, but he would not oppose or argue against our Motion to Reduce, which we would make to Judge Daugherty in the event we lose the appeal.

(2. He would let Mr. Boss plead guilty to a misdemeanor on the present charge. The most that could be given for the misdemeanor would be a year in jail and a fine and he thinks that the Judge would not, due to Mr. Boss' age, require him to do any time.

(3. He thinks he is probably going to indict both of you for perjury in connection with the testimony given by you in the previous trial and he would foregt about that.

(4. He would communicate with Don Shaw and try to get Don Shaw to take care of the Hugo charge.

I told him I would pass this along to you.

I don't know that you shouldn't consider these things. I just hate to see you choused around so much.

Sincerely,

STAMPER, OTIS & BURRAGE
By /s/ JOE STAMPER

JS:pc

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

No. 80-30-CR

UNITED STATES OF AMERICA, *Plaintiff*,

vs.

DOUGLAS BOSS, and J. C. BOSS, *Defendants*.

BRIEF IN SUPPORT OF MOTION TO DISMISS, AND FOR EVIDENTIARY HEARING AND FOR ALLOWANCE OF INTERLOCUTORY APPEAL IF EITHER OF SUCH MOTIONS BE DENIED

(Filed April 28, 1980)

This Brief is submitted by defendants in support of their Motion to Dismiss for the reason that prosecution in this case is selective and vindictive.

The facts are that Douglas Boss, one of defendants herein, was indicted on June 19, 1978, charged in two counts, Counts One with stealing 904 cases of liquor on August 25, 1977, from interstate commerce. In Count Two Douglas Boss was charged with having the same liquor in his possession on September 3, 1977.

Douglas Boss was tried in August of 1978 and acquitted. At that time the Government had substantially the same evidence against the defendant J. C. Boss. Approximately one and one-half years went by and the defendant J. C. Boss had not been indicted. The District Antorney and/or the FBI then informed these defendants and their attorney that unless they testify against one or more third parties, that the defendant J. C. Boss would be indicted for the same charge upon which his son Douglas Boss had been tried and acquitted and that both of these defendants would be charged with perjury as a result of evidence given by them at the trial of the said Douglas Boss in 1978.

If these defendants or either of them had any knowledge of the matter or matters about which they were asked to give evidence, then they certainly had Fifth Amendment right not to give evidence because they could have only given evidence had they been involved and their evidence would have been incriminating. Therefore, it was within the constitutional and legal rights of these defendants to refuse to give evidence in a mere interview. No attempt was made to subpoena either of these defendants before a Federal Grand Jury in order that they might formally claim their Fifth Amendment rights and be granted immunity.

On February 5, 1980, the defendant J. C. Boss was indicted in two counts, the counts being substantially identical to those upon which Douglas Boss had been indicted and acquitted. Defendant J. C. Boss filed Motion to Dismiss on the grounds of jurisdiction and selective prosecution, which was denied by the Court without hearing. The said J. C. Boss was convicted at a trial commencing April 7, 1980, and awaits sentencing.

On April 23, 1980, these defendants were indicted for perjury by reason of evidence given by them at the trial of Douglas Boss on August 29, 1978, such indictment being returned 20 months and 25 days after the occurrence of the alleged event.

The defendants and their counsel believe that in almost no other case in this District during the administration of the present United States District Attorney has there been prosecution for perjury against a person upon which such charge being based upon evidence given at his trial. Yet, it is common knowledge that defendants who take the stand deny their guilt and make statements in denial thereof and that almost any defendant who has been tried and takes the witness stand testifies differently from the Government's witnesses and is automatically suspect of perjury and in many many cases might be prosecuted.

If in fact this is the only case or one of few cases in which defendants or witnesses have been so prosecuted, then such fact would constitute selective prosecution as well as vindictive prosecution. This can only be determined after investigation and a hearing and evidence. Defendants intend at such hearing to question the Honorable Julian Fite and other members of his staff with reference to various cases in which criminal trials have been held, and to ask and seek information as to how many people have committed perjury in such trials and how many of them have been prosecuted.

The actions of the Government in these prosecutions constitute vindictive, discriminatory and selective prosecution.

In U.S.A. v. OAKS (1974 CA 9) 508 F.2d 1403, Oaks was convicted for wilfully failing to file income tax return and supplying false withholding certificate. The claim of discriminatory selective prosecution and the Court's ruling are sufficiently set forth in the cited portion of the opinion as follows:

> "Oaks contends that he was selected for prosecution solely because he protested publicly against federal tax policies. While we express no opinion upon this issue, the law in this circuit requires the district court, upon a proper offer of proof, to allow Oaks to present evidence, if any, that he has been singeld out for discriminatory prosecution.
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> "Oaks argues that under this circuit's STEELE rationale he has alleged facts sufficient to require a hearing on his claim of discriminatory selective prosecution. Hearings on similar pre-trial objections are usually in order when enough facts are alleged to take the question past the frivolous stage. See, e.g., LAWN v. UNITED STATES, 355 U.S. 339, 346-350, 78 S.Ct. 311, 2

L.Ed.2d 321 (1958); NARDONE v. UNITED STATES, 308 U.S. 338, 342, 60 S.Ct. 266, 84 L.Ed. 307 (1939); UNITED STATES v. FUJIMOTO, 102 F.Supp. 890, 893 (D. Hawaii 1952). We hold that Oaks has alleged enough facts to require an evidentiary hearing.

"The government contends that Oaks waived the defense of discriminatory prosecution, if it is a defense, because he brought no formal motion pursuant to Fed.R.Crim.P. 12(b)(2) prior to trial. * * * the Supreme Court in FALLEN v. UNITED STATES, 378 U.S. 139, 142, 84 S.Ct. 1689, 12 L.Ed.2d 760 (1964), cautioned against an overly rigid or formalistic interpretation of the federal criminal rules. The record before us reveals that the point was raised during the pretrial hearing on June 4, 1973. Counsel's presentation, while not in writing, was sufficient to comply with Rule 12 (B)(2). * * * There was no further discussion of the issue until trial, but Oaks' counsel had attempted to introduce evidence at the motions hearing * * *. He had made his record.

* * *

"This cause is remanded for a hearing on the issue of discriminatory prosecution. If the District court finds that there was impermissible discrimination, it should dismiss the indictment. * * *"

In U.S.A. v. ANDREWS, (USDC ED Mich SD, 1978), 444 F.Supp. 1238, defendants were charged with conspiracy, possession with intent to distribute heroin, and unlawfully carrying firearms. The portion of the Court's opinion cited below sets forth the facts and the Court's opinion:

"The defendants contend that Count 1 of the superseding indictment, the conspiracy count, should be dismissed because it was obtained in a fashion that suggests impermissible prosecutorial vindictiveness. * * * defendants were arrested * * * on November 16, 1975.

* * * On December 29, 1976, defendants Andrews and Brooks * * * were remanded without bail as requested by government motion. They appealed to this Court and were admitted to bail January 11. On January 13, 1977, the Grand Jury returned a second superseding indictment identical to the November, 1976 indictment except that a conspiracy count was added. Defendants contend that the second superseding indictment, which added a new charge after they exercised their constitutional and statutory rihgts to be admitted to reasonable bail, was an impermissible exercise of prosecutorial power tending to chill the exercise of their rights.

"Due process of law requires that even the appearance of vindictiveness must be absent from judicial proceedings. Thus, in NORTH CAROLINA v. PEARCE, 395 U.S. 711, 80 S.Ct. 2072, 23 L.Ed.2d 656 (1969) the Supreme Court reversed a conviction where a greater sentence was imposed on a defendant after he was retried following reversal of his initial convictions. The Court held that these greater sentences resulted in a chilling of the defendant's right to appeal where there were no identifiable, objective reasons appearing on the record for the increased sentence. The Court said:

> " 'Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since such fear of vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.' Id. at 725, 89 S.Ct. at 2080.

"In BLACKLEDGE v. PERRY, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974) this holding was extended to encompass vindictive prosecutorial action. Over a single dissent, the Supreme Court held that where a prosecutor who has a stake in the outcome 'ups the ante' after a defendant exercises his right to a trial de novo in a two-tiered criminal system, the ruling of NORTH CAROLINA v. PEARCE, supra, applies. In BLACKLEDGE the court exmphasized that the lack of proof of bad faith is not fatal to a defendant's due process claim. Instead the Court said:

> " 'The rationale of our judgment in the PEARCE case, however, was not grounded upon the proposition that actual retaliatory motivation must inevitably exist. Rather, we emphasized that "since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal * * * (it is the apprehension of the harm which is the evil)." ' BLACKLEDGE v. PERRY, supra at 28, 94 S.Ct. at 2102.

"Courts have interpreted this language to mean that in the context of a colorable claim of prosecutorial vindictiveness the prosecutor must justify his or her actions in the same manner as would a judge under PEARCE by some fact or event, unrelated to the defendant's exercise of his rights, of which the prosecutor learns after the initial charge. U. S. v. RUESGA-MARTINEZ, 534 F.2d 1367 (9th Cir. 1976); U.S. v. JAMISON, 164 U.S.App.D.C. 300, 505 F.2d 407 (1974); U.S. v. GERARD, 491 F.2d 1300 (9th Cir. 1974). SEFCHECK v. BREWER, 301 F.Supp. 793 (S.D. Iowa 1969). Consistent with PEARCE and BLACKLEDGE, these courts' inquiries have not been directed as whether actual retaliation was shown, but whether the *appearance* of vindictiveness exists. See, also U.S. v. JOHNSON, 537 F.2d 1170 (4th Cir. 1976). * * *

"* * * it is the apprehension that there may be retaliatory action, not the procedural state of the facts, which implicates due process rights. Reduced to its simplest term, the Court is presented with a situation where there was an exercise by defendants of their right to seek admittance to bail, followed by a superseding indictment charging a new crime, with a separate penalty which arose from the same events that led to the original indictment. This is clearly a case that calls for analysis under the rule of PEARCE and BLACKLEDGE.

* * *

"* * * The government expressly concedes that all the elements of the conspiracy charge, and all the facts which underlie the charge, were known to it at the time of the November, 1976 indictment. Instead the government seeks to justify its conduct by pointing out that the prosecutor in this case was inexperienced and did not realize that she should or could have sought a conspiracy indictment. * * * it is argued, prevented the presentation of testimony concerning a conspiracy to the Grand Jury until two days after the defendants' bond motion was decided. * * *

"In U.S. v. RUESGA-MARTINEZ, supra, the Ninth Circuit, in an impressive opinion, considered certain of the issues presented by these facts. * * * Although the prosecutor, who was inexperienced, knew defendant to be a multiple offender, he nonetheless chose to charge him with the misdemeanor. When the defendant was arraigned he refused to waive his right to be tried by a district judge and a jury. Thereafter, the United States Attorney charged defendant with unlawful entry under 8 U.S.C. Sec. 1326, the felony provision. Defendant moved to dismiss the superseding indictment for prosecutorial vindictiveness.

"The Ninth Circuit held that when the prosecution reindicts an accused after he has exercised some procedural right, it bears a heavy burden to prove that an increase in the charge was justified. While not questioning the integrity of the prosecution, the RUESGA-MARTINEZ court said 'the mere *appearance* of vindictiveness is enough to place the burden on the prosecution.' • • • Obviously, the interest of a defendant in securing due process of law far outweighs any consideration to be granted inexperienced prosecutors. The Ninth Circuit also noted that regardless of the nature of the evidence in support of the increased charge, where the facts were known to the United States Attorney at the time of the original complaint, the prosecutor has made a discretionary choice which may not be rescinded at his or her unfettered discretion.

• • •

"• • • This Court is in full agreement with the conclusion of the Ninth Circuit that

> " 'BLACKLEDGE and PEARCE each establish a prophylactic rule imposing limits upon prosecutorial discretion is (sic) seeking new indictments or in conducting retrials when such actions carry with them the opportunity of retaliation for a defendant's exercise of a statutory right that has due process implications.' Id.

"For a Constitutional right, it is even more essential to apply the prophylactic rule enunciated in BLACKLEDGE and PEARCE.

"In view of the fact that the teachings of the relevant cases show that

> " 'The prophylactic rule is designed not only to relieve the defendant who has asserted his right from bearing the burden from (sic) "upping the

ante" but also to prevent chilling the exercise of such rights by other defendants who must make their choices under similar circumstances in the future.' Id.

" • • • If left uncorrected, such action would undoubtedly chill the assertion of the Constitutional rights. While the Court does not find that the action of the prosecutor was malicious, nor does it question her integrity, it must consider the issue in terms of whether the 'appearances' are outweighed by other societal interests. This is not a case where the government has discovered previously unavailable evidence, so that the societal interest in bringing recently detected crime to justice is implicated. Nor is it a case where the new charge grows out of offenses committed at other times and places. • • •

• • •

" 'To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, see NORTH CAROLINA v. PEARCE, supra, 395 U.S., at 738 (89 S.Ct. 2072) (opinion of Black, J.) and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is "patently unconstitutional." CHAFFIN v. STYNCHCOMBE, supra, 412 U.S. 17 at 32-33, n. 20, (93 S.Ct. 1977, 36 L.Ed.2d 714). See UNITED STATES v. JACKSON, 390 U.S. 570, (88 S.Ct. 1209, 20 L.Ed.2d. 138).'

• • •

"The government's explanation does not overcome our society's substantial interest in preserving unblemished the integrity of our criminal justice system. The unswerving efforts of our judiciary to maintain public confidence in the fairness of the criminal justice

process requires that the prosecution adhere to stringent standards. The Due Process Clause demands no less. • • • "

In U.S.A. v. GROVES (USCA 9, 1978) 571 F.2d 450, defendant was convicted of conspiracy to distribute marijuana. The Government knew in January of 1976 that defendant would cooperate in marijuana investigation only to the extent of giving name and address of person who was principal source of supply. Complaint was filed on January 5, 1976. On January 6th defendant advised the Government Agent that he would not testify other than to give supplier's name and address. On January 13th appellant refused to identify an individual. On October 4, 1976, defendant's counsel asked the United States Attorney to dismiss the Complaint for lack of speedy trial. On October 12, 1976, defendant was indicted. Defendant moved to dismiss on grounds that it was a vindictive prosecution. The Trial Court "found that it was not a vindictive prosecution but the result of the appellant's failure to cooperate". The Assistant District Attorney's Affidavit said, "Based upon the conversation of Alexander, I determined that Groves had not complied with the terms of the bargain and accordingly decided to pursue felony charges against him." The Ninth Circuit Court reversed the conviction and dismissed the indictment, saying in part:

" • • • Specifically, he claims that this is the kind of (prosecutorial) vindictiveness proscribed in BLACKLEDGE v. PERRY, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974), and NORTH CAROLINA v. PEARCE, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969).

" • • • when the prosecution has occasion to reindict an accused because the accused has exercised some procedural right (such as appellant's right to move for dismissal on the cocaine charge under the Speedy Trial Act) the prosecution bears a heavy burden of

proving that any increase in the severity of the *alleged charges* was not motivated by a vindictive purpose. • • •

• • •

"• • • They knew in January of 1976 that appellant would cooperate only to the extent of giving the name and address of the person who was the principal source of supply. Now, however, the government relies upon this 'failure to cooperate' to justify the filing of the felony indictment in October of 1976 (eight days after appellant's counsel raised the Speedy Trial Act issue). The fact that the information supplied by appellant did not measure up to the desired result or satisfy the government is of no relevance on the issue here presented.

"This coincidence of events presents overwhelming circumstantial evidence that the indictment was returned and filed in retaliation for appellant's suggestion that the Speedy Trial Act barred prosecution on the cocaine complaint. With full knowledge of the appellant's violation of the marijuana laws and the extent of his cooperation in January, the government did not see fit to seek the indictment until shortly after the appellant had asserted his statutory rights.

"• • • the district court found that there was no vindictiveness and that the indictment was returned because appellant failed to live up to his promise of cooperation. • • • We hold that the manifest appearance of vindictiveness thus created brought into play the BLACKLEDGE line of cases.

"We need not find that the prosecutor acted in bad faith or that he maliciously sought the marijuana indictment. The core of the BLACKLEDGE, PEARCE and RUESGA-MARTINEZ decisions is that it is the *appearance of vindictiveness,* rather than *vindictiveness in fact,*

which controls. The logic behind the rule is fully explored in those decisions and more recently in the very important case of UNITED STATES v. DeMARCO, 550 F.2d 1224 (CA9, 1977), where the court noted that 'apprehension of vindictiveness' are adequate to bring a case within BLACKLEDGE. See also MIDGETT v. McCLELLAND, 547 F.2d 1194 (CA4 1977); HAYES v. COWAN, 547 F.2d 42 (CA6 1976); UNITED STATES v. JOHNSON, 537 F.2d 1170 (CA4 1976). * * *

"The record before us in closely akin to that before the court in DeMARCO, supra. * * * The district court found that after the motions were granted, the prosecutor told defendant's counsel that * * * if the case was transferred to California, the government would consider more counts against the defendant. The defendant insisted on his venue rights and the case was transferred to California. * * * the government obtained a second indictment * * *. In DeMARCO, the government argued that BLACKLEDGE was to be distinguished because the first and second indictments were not based on identical facts. The court rejected this argument there too and emphasized that '(t)he factual nucleus of both indictments was the same.' It also noted that '(e)ven if the first and second indictments were not based on facts that were so similar that a trial on one would have prevented trial on the other upon double jeopardy grounds, that situation would not distinguish this case from BLACKLEDGE.'

* * *

"* * * While the actions of the prosecutor in DeMARCO were not as subtle as those of the prosecutor in the case before us, the fact remains that the government forgot about the marihuana case against the appellant in January of 1976 and did not resurrect it until after the appellant had exercised his statutory right to get the cocaine charge dismissed. In urging

> that the new charges were based upon the appellant's failure to cooperate, the government ignores the fact that the appellant took the same position in January of 1976 as he took in October of 1976 * * *. Moreover, the government knew all of the facts relating to the marihuana charge on the same day that the cocaine complaint was filed. The record is utterly devoid of any evidence that the government relied upon any promise of the appellant after January of 1976. The conclusion is inescapable on this record that the government brought the marihuana charge in retaliation for the appellant's exercise of his statutory rights on the cocaine charge."

Defendants have also asked for additional time to file other pre-trial motions, suspension of any proceedings herein until evidentiary hearing be held. Defendants shall attempt to seek relaxation of the rule of this Court ordinarily imposed which requires filing of pre-trial motions within five days. This may be a reasonable rule for attorneys who live in Muskogee and only have one case. It is not a reasonable rule for attorneys who live 140 miles away from Muskogee and have a large practice, with conflicting court schedules, and the necessity of briefs on every point.

The case of McGhee v. Draper (CCA 10, 1977) 564 F.2d 902, opinion by Judge Holloway, the Circuit Court was considering the dismissal of a teacher. The Court held that a notice of a hearing by a school board was insufficient and said in part:

> "Second, we agree that where the potential of a stigma or disability to take advantage of further employment is involved, reasonable notice of the substance of the charges to be considered is required. * * * We are satisfied that this plaintiff did not have reasonable notice of the charges against her. * * *

> "* * * We merely hold that if a potential stigma and liberty interest infringement are found, it is essential that reasonable notice of the charges be given before the hearing, which was not done here.
>
> * * *
>
> "The Supreme Court has made it clear that 'procedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood.' * * * *"

Surely a person charged with a felony and subject to going to the penitentiary is entitled to as much consideration with respect to a hearing as a school teacher in the McGhee case who was allegedly fired for distributing pornography to her students.

A motion similar to this was filed prior to the trial of J. C. Boss. It was overruled. The facts supporting the Motion to Dismiss in this cause are stronger than they were in the case of J. C. Boss for interstate theft. To summarize, these defendants had an absolute constitutional right to not incriminate themselves in conversations with the FBI or the District Attorney. The Government did not avail itself of its right to call them before a grand jury investigating Buchanan. Had the Government done so, then there is no reason to believe that they would have testified freely and truthfully under grant of immunity. The evidence adduced at the hearing together with the evidence outlined in the motion clearly show that these defendants are presently being prosecuted for perjury because they refused to give evidence which the Government desired against Buchanan and possibly others. Their counsel does not know what evidence, if any, they could have given against Sheriff Buchanan and others, or what others, and so we are not in position to outline the extent of the Government's desires other than that the Government did want them to give testimony against Sheriff Buchanan.

This was clearly a constitutional right and it is clear from the statements of the District Attorney to both Attorneys Stamper and Burrage and we do not believe that the District Attorney will deny that he told Attorneys Stamper and Burrage that unless these defendants gave information re Buchanan they would be indicted for perjury. When the Motion similar to this was presented to the Court on behalf of J. C. Boss in the interstate theft charge, the Government argued that before a prosecution should or could be dismissed it had to be both vindictive and selective. The present motion is much stronger with respect to the vindictiveness because there is cumulative evidence shown in the conversation between the District Attorney and Attorney Stamper on the Friday before Samper wrote the letter attached to the Motion which this Brief supports. At that time J. C. Boss had been indicted for the interstate theft, but neither of the present defendants had been indicted for perjury. Also the conversations with both of defendants' attorneys ante-dated the present indictments. There can be no doubt of the vindictive nature. As to the selectivity we have shown in the Motion that many people involved in the interstate liquor theft as shown at the trial of J. C. Boss have not been indicted. These include Don Spanhanks who testified that he had arranged to sell the liquor to someone in Tulsa; Harvey Don Davidson from whom Spanhanks was arranging to get the stolen liquor.

We believe, also, that at an evidentiary hearing, given adequate time to issue subpoenas and prepare for the hearing, we can show that this is one of the few, if not the only, perjury prosecutions within any reasonable time frame preceding such indictment which has been brought against a defendant who took the stand in his own behalf and testified adversely to the Government witnesses and who was nevertheless convicted. We submit that any such person is a likely candidate for perjury indictment. The malodor in this situation is that this prosecution is all because these two defendants availed themselves of their constitutional

right. In reviewing the cases cited in this Brief, we find cases holding as follows:

1. The Trial Court upon the proper offer of proof, must allow a defendant to present evidence, "that he has been singled out for discriminatory prosecution". (USA v. OAKS, supra)

2. That defendants who were re-indicted and an extra count added because they exercised their constitutional right to bail would not be permitted. (USA v. ANDREWS, supra)

3. Where a greater sentence was imposed on a defendant after he was re-indicted because he had reversed the original conviction and the Supreme Court held that this resulted in a chilling of a defendant's right to appeal. (NORTH CAROLINA v. PEARCE, supra)

4. A case where a defendant was a multiple offender but charged with a misdemeanor and refused to waive his right to be tried by a district judge and jury, whereupon, he was charged with a felony. (U.S. v. RUESGA-MARTINEZ, supra)

As the Court said in GROVES, supra, it need not be found "that the prosecutor acted in bad faith or that he maliciously sought the * * * indictment. It is the appearance of vindictiveness, rather than vindictiveness in fact, which controls." The Ninth, Fourth and Sixth Circuits have generally followed this rule based upon BLACKLEDGE v. PERRY, supra. We have found no case in which the Tenth Circuit has disagreed with these holdings. The point is that for someone to be prosecuted, he need not have been prosecuted if he had waived constitutional rights, then such action by the Government chills the constitutional rights and a defendant is protected against such prosecution.

This case should be dismissed even without a hearing. But certainly we are entitled to a hearing and an oppor-

tunity to present the evidence outlined in the Motion and in this Brief.

We have asked in the Motion for allowance of an interlocutory appeal if the Motions to Dismiss and/or for hearing on dismissal are overruled. Counsel started writing this Motion and Brief on Thursday afternoon, April 24, 1980. He had to be out of his office all day the following day to go to Houston, Texas, and is leaving on Sunday, April 27, 1980, and will not be back in his office until Thursday, May 1, 1980, at which time the usual five days for filing preliminary motions will have almost expired. Both the Court and the District Attorney have known of this intended journey and its purpose for several weeks. We request an additional 15 days within which to submit authorities if any can be found, as to whether we are entitled to such interlocutory appeal. Frankly, within the time available, we have found no ground therefor. However, we learn more law (?) from reading the newspapers than we do from studying the law books and we have read about a case involving much more prominent people than these, who have lodged or been permited to lodge an interlocutory appeal with respect to whether this district or the Western District of Oklahoma has venue and/or jurisdiction of their criminal indictment. We are seeking information as to the basis of such appeal.

We have also had to spend all available time between receipt of notice of the indictment on the Motion and Brief herein and have not had time to prepare other pre-trial motions and we request additional time for their preparation. The two defendants herein by signing the Motion in behalf of which this Brief is submitted, have specifically waived their rights under the Speedy Trial Act, and therefore what we believe to be the usual reasons for the very limited time within which to file pre-trial motions allowed an indicted person are not present.

We would also like to take the earliest possible opportunity, and this is such opportunity, to advise the Court that these defendants' chief counsel accepted an invitation almost a year ago to address the South Dakota Bar Association and attend its State Convention as a guest during the period June 19 thru June 21, 1980, and must attend the American Bar Convention during the period July 31 to August 7, 1980, and we would respectfully request the Court and ask for the Court's indulgence in not setting anything relating to these cases during that period and we would respectfully request the U. S. District Attorney to not indict either Douglas Boss or J. C. Boss during such periods or upon such dates as would require their appearance or the preparation or filing of motions in their behalf during such periods.

STAMPER, OTIS & BURRAGE
Box 100, Antlers, OK 74523
By /s/ JOE STAMPER
Attorneys for Defendants

DATED APRIL 26, 1980

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

No. 80-30-CR

UNITED STATES OF AMERICA, *Plaintiff*,

-vs-

DOUGLAS BOSS and J. C. BOSS, *Defendants*.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS AND DEFENDANTS' MOTION FOR AN EVIDENTIARY HEARING

(Filed May 15, 1980)

Defendants move the court to dismiss this action for the reason that the prosecution is selective and vindictive. Specifically, defendants allege that the U. S. Attorney, Julian Fite, told defendants that he would prosecute them if they did not provide him with information on other investigations. Defendants refused. Defendants now argue that this action is brought against them for refusal to waive their Fifth Amendment rights not to incriminate themselves. In support of this allegation, defendants argue that the government singled them out in that others testifying at the respective trials of defendants J. C. Boss and of Douglas Boss were not indicted for perjury. Furthermore, defendants claim that the delay from August, 1977, when defendants alleged perjury took place, until April, 1980, when defendants were indicted, establishes that this is a vindictive prosecution.

After careful consideration of the pleadings and briefs of the parties, the court denies defendants' motion to dismiss. A prosecution for violation of a criminal law is presumably undertaken in good faith. *United States v. Bennet*, 539 F.2d 45, 54 (10th Cir. 1975). Furthermore, the conscious exercise of some selectivity in the enforcement of the laws does not violate the United States Constitution.

Bordenkircher v. Hayes, 434 U.S. 357, 364 (1977); *Oyler v. Boles,* 368 U.S. 448 (1962). To determine whether a party has established a prima facie case of selective prosecution sufficient to warrant a hearing, the party seeking the hearing must demonstrate, at least prima facie, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights. These two essential elements are sometimes referred to as "intentional and purposeful discrimination." The defendant must present facts sufficient to raise a reasonable doubt about the prosecutor's purpose. *See, Bordenkircher v. Hayes,* 434 U.S. *supra* at 364. A majority of the United States Courts of Appeals has also recognized this test. *See, e.g., United States v. Warinner,* 607 F.2d 211, 213 (8th Cir. 1979); *United States v. Leggett & Platt, Inc.,* 542 F.2d 655 (6th Cir. 1976), *cert. denied,* 430 U.S. 945, 97 S.Ct. 1579, 51 L.Ed.2d 792 (1977); *United States v. Bourque,* 541 F.2d 290 (1st Cir. 1976); *United States v. Peskin,* 527 F.2d 71 (7th Cir. 1975), *cert. denied,* 429 U.S. 818, 97 S.Ct. 63, 50 L.Ed. 2d 79 (1976); *United States v. Scott,* 521 F.2d 1188 (9th Cir. 1975), *cert. denied,* 424 U.S. 955, 96 S.Ct. 1431, 47 L.Ed.2d 361 (1976); *United States v. Berrios,* 501 F.2d 1207, 1211 (2d Cir. 1974).

Defendants have failed to demonstrate that the government has singled them out for this perjury indictment in retaliation for exercising their rights not to incriminate themselves. Defendants list others they claim are similarly situated, yet were not prosecuted for perjury. However, the government states that it has no information that any of the individuals listed in defendants' brief committed perjury. And defendants are not the only ones the government has ever prosecuted for perjury. *See, e. g., United States v.*

Lawrence Wesely Williford and Carl Eugene Hines, No. 80-15-Cr (E.D.Okla. 1980). The court, therefore, concludes that defendants have failed to demonstrate that they have been singled out for this indictment.

Defendants have also failed to demonstrate that, even if they were singled out for prosecution, they were singled out for exercising their Fifth Amendment rights against self-incrimination. The information sought by the prosecutor in return for not indicting defendants related to investigations of James Buchanan, not defendants. The prosecution of those who perjure themselves is not selection on an impermissible basis.

Therefore, defendants' motion to dismiss the indictment as vindictive is denied. Likewise, the court denies defendants' motion for an evidentiary hearing on their motion to dismiss.

ORDERED this 15th day of May, 1980.

/s/ Frank H. Seay
Frank H. Seay
United States District Judge

UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA vs.
Defendant— DOUGLAS BOSS

Docket No. 80-30-CR

JUDGMENT AND PROBATION/COMMITMENT ORDER
AO-245 (5/75)

(Filed June 25, 1980)

In the presence of the attorney for the government the defendant appeared in person on this date—

June 25, 1980

Counsel—

☐ WITHOUT COUNSEL • • •

☒ WITH COUNSEL—(Name of counsel) JOE STAMPER

Plea—

☐ GUILTY • • •, ☐ NOLO CONTENDERE, ☐ NOT GUILTY

Finding & Judgment—

There being a finding/verdict of

☐ NOT GUILTY. • • •

☒ GUILTY, as to Counts 1 and 2 of the Indictment.

Defendant has been convicted as charged of the offense(s) of on or about August 28, 1978, in the Eastern District of Oklahoma, having taken an oath before a competent tribunal, did wilfully and knowingly, and contrary to said oath, state material matters which he did not believe to be true, in violation of 18 USC 1621.

Sentence or Probation Order—

The court asked whether defendant had anything to say why judgment should not be pronounced. Because

no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of one year as to Count 1, said sentence to run consecutively to the sentence heretofore imposed in Case No. 79-68-CR.

It is adjudged as to Count 2 that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for a period of one year to run concurrently with the sentence imposed in Count 1, but consecutively to the sentence imposed in 79-68-CR.

Special Conditions of Probation—

Additional Conditions of Probation—

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

Commitment Recommendation—

The court orders commitment to the custody of the Attorney General and recommends,

Signed by ☒ U.S. District Judge FRANK H. SEAY
Frank H. Seay

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

UNITED STATES OF AMERICA, ss:

Eastern District of Oklahoma

I, Lewis L. Vaughn, Clerk of the U. S. District Court for the Eastern District of Oklahoma, do hereby certify that the foregoing is a true and full copy of the original instrument, now remaining among the records of the said court in my office.

WITNESS my hand and the seal of said court this 11th day of July 1980.

LEWIS L. VAUGHN, Clerk,

By: /s/ DAVID L. MCELVANIA
Deputy Clerk

[SEAL]

3-24-81 80-1681

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SLIP OPINION

Not for Routine Publication

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 80-1681

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

DOUGLAS BOSS, *Defendant-Appellant.*

Appeal from the United States District Court
For the Eastern District of Oklahoma

(D. C. No. 80-30-CR)

(Filed March 24, 1981)

Michael Barrage (Joe Stamper with him on the brief), of Stamper, Otis & Burrage, Antlers, Oklahoma, for Defendant-Appellant.

G. Steven Stidham, Assistant United States Attorney (Julian K. Fite, United States Attorney, with him on the brief), Muskogee, Oklahoma, for Plaintiff-Appellee.

Before HOLLOWAY, LOGAN and SEYMOUR, Circuit Judges.

PER CURIAM.

Douglas Boss appeals from his conviction for perjury committed during the course of a trial, in violation of 18 U.S.C. § 1621. The only issue on appeal is whether Boss was the victim of unlawful vindictive prosecution.

Boss was prosecuted but acquitted by a jury for participation in the theft of liquor from an interstate shipment. That prosecution arose out of the same incident in which his father, J. C. Boss, Jr., was involved, whose conviction from a later trial we affirmed in an opinion entered this day. (United States v. Boss, No. 80-1472.) After his acquit-

tal on the charges, it was ascertained that Douglas Boss lied while testifying in his own behalf at the trial. In fact, it is apparent from stipulated facts in the instant case that Boss committed perjury at the earlier trial.

Boss' argument, like that of his father, J. C. Boss, Jr., is that he was a victim of unlawful vindictive prosecution. Boss asserts that he was penalized for asserting his Fifth Amendment rights when he refused to cooperate with officials in the investigation of other participants in that incident. We find no merit in the contention, for the reasons stated in the *J. C. Boss, Jr.*, case, *supra*.

AFFIRMED.

3-24-81 80-1472

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SLIP OPINION

Pubish

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 80-1472

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

J. C. BOSS, JR., *Defendant-Appellant.*

Appeal from the United States District Court
For the Eastern District of Oklahoma

(D. C. No. 80-9-CR)

(Filed March 24, 1981)

Michael Burrage (Joe Stamper with him on the brief), of Stamper, Otis & Burrage, Antlers, Oklahoma, for Defendant-Appellant.

G. Steven Stidham, Assistant United States Attorney (Julian K. Fite, United States Attorney, with him on the brief), Muskogee, Oklahoma, for Plaintiff-Appellee.

Before HOLLOWAY, LOGAN and SEYMOUR, Circuit Judges.

LOGAN, Circuit Judge.

J. C. Boss, Jr. appeals from his conviction for theft of liquor moving in interstate commerce in violation of 18 U.S.C. § 659. He contends that his conviction must be reversed because (1) he was a victim of selective and vindictive prosecution in violation of his constitutional rights; (2) the court should have instructed the jury that Boss could not be convicted unless he had knowledge the liquor was stolen; (3) the court should have permitted his counsel to examine a memorandum on the person of one of the government's witnesses; and (4) the evidence was insufficient to permit the case to go to jury.

The selective prosecution issue arises out of the fact that several other individuals who were involved in the same incident were not prosecuted. Defendant's son, Douglas Boss, was indicted in August 1978. Other participants were not charged or treated differently. Federal authorities wanted to obtain evidence that the local sheriff was crooked and involved in this criminal activity. Defendant and his son were both asked to give evidence for the prosecution, and in informal discussions were told they would be prosecuted if they failed to cooperate. They refused to cooperate and now claim that the government's singling them out amounts to selective prosecution (see companion case United States v. Boss, (No. 80-1681), entered this day, involving prosecution of Douglas Boss for perjury). The essence of the contention is that by refusing to cooperate with the government the parties were exercising their Fifth Amendment right not to incriminate themselves. They argue that prosecuting them in a manner different from others involved in the same incident constitutes impermissible selective prosecution under opinions such as Blackledge v. Perry, 417 U.S. 21 (1974), and United States v. Oaks, 508 F.2d 1403 (9th Cir. 1974).

We do not agree. In *Perry* the defendant was convicted of a misdemeanor in a lower tier court. He appealed the conviction, thereby exercising his statutory privilege to a trial de novo in the state superior court. While this appeal was pending, the prosecutor indicted him anew for the same offense, this time charging a felony. The other cases relied upon by defendant also involve possibly vindictive action by the government in retaliation against a defendant's lawful actions.

As explained in Bordenkircher v. Hayes, 434 U.S. 357 (1978), the due process violation in cases such as *Perry* lies not in the possibility that a defendant might be deterred from the exercise of a legal right, but rather in the danger that the state might be retaliating against the accused for

conduct that the law plainly allows. *Id.* at 363. The Supreme Court held that "in the 'give-and-take' of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer." *Id.* The Court pointed out that the discouragement of a defendant's exercise of his trial rights is an inevitable attribute of any legitimate system that tolerates and encourages the negotiation of pleas. *Id.* at 364. Boss apparently wanted more here than the prosecution was willing to offer for his testimony. No evidence is presented to show that Boss was not given a free choice in accepting or rejecting the prosecution's offer; nor is there any suggestion that the prosecutor lacked probable cause to believe Boss had committed the charged crime.

What happened in this case is no different from most situations in which prosecutors seek information to convict principals in crime by offering coconspirators immunity or leniency in return for testimony. When the party refuses to cooperate, prosecution, based upon probable cause to believe the defendant committed the crime charged, does not present the likelihood of vindictiveness found in *Perry* and related cases. *See* United States v. Gardner, 611 F.2d 770 (9th Cir. 1980). We find no selective prosecution in these circumstances.

We see no merit in the claim that the jury should have been instructed specifically that to be convicted defendant must have known the liquor was stolen at the time he participated in the transfer. The indictment made it clear the charged crime was appropriating property in interstate shipment, "willfully and knowingly, and with intent to convert [it] to his own use." The instructions as a whole made it abundantly clear that Boss had knowingly take the property of someone else for his own use in order to be convicted. We see no need for a specific instruction regarding defendant's knowledge that the liquor was stolen, and it was proper for the court not to give it.

Likewise, we see no merit in the contention that defendant's counsel should have been permitted to examine a memorandum on the person of a government witness. During a recess, the witness referred to something he had in his pocket concerning other individuals, which he later testified had nothing to do with this trial. When defense counsel asked to see the memorandum, the trial judge examined the document and expressed his satisfaction that it had nothing to do with his trial. We will not predicate a reversal here on the speculation that the trial judge was wrong, and that this defendant's counsel might have seen something he could use for the benefit of his client.

With respect to the sufficiency of the evidence, we have examined the record; there is ample evidence to warrant submitting the case to the jury and to support the jury's verdict of guilty.

AFFIRMED.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
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February 18, 1982

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Re: 80-1681, U.S.A. v. Douglas Boss

Dear Counsel:

Enclosed is a copy of an order entered today in the captioned appeal.

Very truly yours,
HOWARD K. PHILLIPS, Clerk
/s/ ROBERT L. HOECKER
Robert L. Hoecker
Chief Deputy Clerk

RLH:rp
Enclosure

NOVEMBER TERM—FEBRUARY 18, 1982

Before Honorable William J. Holloway, Jr., Honorable James K. Logan and Honorable Stephanie K. Seymour, Circuit Judges.

No. 80-1681

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

DOUGLAS BOSS, *Defendant-Appellant.*

This matter comes on for consideration of appellant's petition for rehearing filed in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied.

HOWARD K. PHILLIPS, Clerk
/s/ ROBERT L. HOECKER
Robert L. Hoecker
Chief Deputy Clerk

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TENTH CIRCUIT
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February 23, 1982

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Re: 80-1681, U.S.A. v. Douglas Boss

Dear Counsel:

Enclosed is a copy of an order entered today in the captioned cause.

Very truly yours,
HOWARD K. PHILLIPS, Clerk
By /s/ ROBERT L. HOECKER
Robert L. Hoecker
Chief Deputy Clerk

RLH:rp
Enclosure

NOVEMBER TERM—FEBRUARY 18, 1982

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable Jmaes K. Logan and Honorable Stephanie K. Seymour, Circuit Judges.

No. 80-1681

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

DOUGLAS BOSS, *Defendant-Appellant.*

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

The petition for rehearing was denied on February 18, 1982 by the panel to whom the case was argued and submitted.

The petition having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

HOWARD K. PHILLIPS, Clerk
By /s/ ROBERT L. HOECKER
Robert L. Hoecker
Chief Deputy Clerk